RECORD AND BRIEFS

SUPREME COURT, U.S.
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No. 16-784

In the
Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The Bankruptcy Code identifies a number of transfers that a trustee "may avoid" or undo. Section 546(e) of the Code, however, provides that "notwithstanding" that avoidance power, the trustee "may not avoid" a "transfer that is a ... settlement payment ... made by or to (or for the benefit of)" a half-dozen specific entities, including a "financial institution." The only transfer the trustee sought to avoid in this case was a generous payment made by one aspiring horse track owner to another horse track owner for the latter's shares. It is conceded that neither horse track is a financial institution or other entity identified in §546(e). The question presented is whether §546(e) nevertheless bars the trustee's avoidance action because the transfer in question, like virtually all transactions in today's economy, was executed through two banks.

CORPORATE DISCLOSURE STATEMENT

Respondent FTI Consulting, Inc., has no corporate parent and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Several provisions in Chapter 5 of the Bankruptcy Code empower a trustee administering a debtor's estate to "avoid," or undo, certain transfers by the debtor. As relevant here, §548(a)(1)(B) of the Code empowers a trustee to avoid a "constructively fraudulent" transfer by the debtor, in which the debtor, while insolvent, did not receive "reasonably equivalent value in exchange for" the transfer. Section 546 of the Code, however, creates exceptions for certain otherwise-avoidable transfers. In particular, under §546(e), a trustee "may not avoid" a "transfer" that is a "settlement payment ... made by or to (or for the benefit of)" a financial institution or other enumerated entity.

In this case, the "transfer" that the trustee sought to avoid was a $16.5 million payment by the debtor, Valley View Downs—the aspiring owner of a "racino" (a gambler's paradise featuring both horse racing and a casino)—to petitioner Merit Management in exchange for Merit's shares in Bedford Downs, a competitor in the racino industry. It is undisputed that neither Valley View nor Merit is one of the multiple entities listed in §546(e). By its plain terms, therefore, the racino-to-racino transfer that the trustee seeks to avoid does not come within the §546(e) exception.

Nevertheless, Merit contends that the trustee's power to avoid the racino-to-racino transfer is still defeated by §546(e). Merit reaches that counterintuitive conclusion by deconstructing the racino-to-racino transfer into the component parts by which it was executed, which unsurprisingly involved

wire transfers between financial institutions, and then treating those components as the relevant "transfers" for §546(e) purposes. Through this process of deconstruction, Merit identifies not one, but three transfers by financial institutions involved in the racino-to-racino transfer. Although the trustee here (*i.e.*, the Respondent) did not seek—and, indeed, was powerless—to avoid any of those transfers (because, among other reasons, the trustee's avoidance power is limited to transfers *by the debtor*), Merit contends that the fact that the otherwise-avoidable racino-to-racino transfer was executed via wire transfers by financial institutions is enough to shield it from avoidance.

This Court should reject that contrived and impractical interpretation of §546(e). The statutory text, context, and purpose make clear that §546(e) is an exception to the trustee's avoidance power, and as such the "transfer" that the trustee "may not avoid" under §546(e) is the same transfer that the trustee seeks to avoid under the logically antecedent and textually cross-referenced avoidance powers. Here, as the parties agree, Respondent sought to avoid only the transfer *by Valley View to Merit*, neither of which, the parties further agree, is a protected entity listed in §546(e), such as a financial institution. Respondent does not seek to avoid any transfer by, to, or for the benefit of a financial institution or any other entity listed in §546(e). Accordingly, the exception to the trustee's avoidance power set forth in §546(e) does not preclude avoidance.

Merit's implausible interpretation of §546(e) has nothing to recommend it. It conflicts with the text, context, and purpose of the Code provisions at issue.

But, even more fundamentally, Merit's position conflicts with this Court's obligation to "make sense rather than nonsense out of the *corpus juris*." *Maslenjak v. United States*, 137 S. Ct. 1918, 1926 (2017) (quoting *W.V. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991)).

Merit would create an exception to the trustee's avoidance power that is wholly divorced from both the transfer that the trustee seeks to avoid and the problems Congress sought to address in §546(e). That broad exception would truly make nonsense of the Code. Merit would protect thousands of dubious transfers that harm innocent creditors and pose no risk whatsoever to the enumerated institutions that Congress sought to protect in §546(e). If a trustee seeks to avoid a transfer by a financial-institution debtor or to (or for the benefit of) a financial institution—all of which would be authorized by the trustee's avoidance powers in the absence of §546(e)—then the threat to the financial institution (or other protected entity) is palpable. But when the transfer at issue is a dubious transfer of substantial funds from one racino to another, §546(e) is textually inapplicable and its application would harm innocent creditors without any countervailing benefits to financial institutions and other enumerated entities (which presumably explains their non-appearance as top-side *amici*).

Chief Judge Wood's careful opinion for a unanimous Seventh Circuit panel correctly construed §546(e) as an important, but limited, exception that applies only when the transfer that the trustee seeks to avoid is made by or to (or for the benefit of) one of

the enumerated entities—which the racinos involved in this case most assuredly are not. The judgment should be affirmed.

STATEMENT OF THE CASE

A. Statutory Background

1. The Trustee's Avoidance Powers

One of the most important tools given to a bankruptcy trustee is the power of "avoidance," which refers to the power of a bankruptcy trustee to "undo certain voluntary or involuntary transfers of the debtor's interests in property in order to bring the property back into the bankruptcy estate for distribution purposes." Robert E. Ginsberg et al., Ginsberg & Martin on Bankruptcy §8.01 (5th ed. 2013). The power attaches to transfers by the debtor of assets that properly belong to the estate, and empowers the trustee to avoid such transfers and return the assets to make them available to creditors. This power allows the trustee to reverse transfers that "interfere with" central goals of the bankruptcy system—namely, "deal[ing] with all creditors on an equitable basis" and "maximiz[ing] the value of the estate available for distribution to the entire body of creditors." Charles Jordan Tabb, *Law of Bankruptcy* §6.2 (4th ed. 2016).[1]

The trustee's avoidance powers are set forth in several provisions in Chapter 5 of the Code, each of

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[1] Although this case involves, and this brief refers to, the avoidance power of trustees, avoidance actions may be commenced without material difference to the issues here by a trustee, debtor-in-possession, or creditors' committee. *See* Ginsberg et al., *supra*, §9.07[A].

which imposes certain requirements in order to make a transfer by the debtor one that the trustee may avoid. For example, §547 of the Bankruptcy Code authorizes a trustee to avoid a "preferential transfer," defined as "any transfer of an interest of the debtor in property" made "to or for the benefit of a creditor ... for or on account of an antecedent debt ... while the debtor was insolvent ... within 90 days before the date of the filing of the petition" that "enables [the] creditor to receive more than" the creditor would otherwise receive following bankruptcy. 11 U.S.C. §547(b); *see Barnhill v. Johnson*, 503 U.S. 393, 394 (1992); *Union Bank v. Wolas*, 502 U.S. 151, 154-55 (1991). The power conferred under §547 thus applies only to transfers by the debtor and to a creditor, and the section imposes additional requirements. This power to avoid preferential transfers "facilitate[s] the prime bankruptcy policy of equality of distribution among creditors," by ensuring that any creditor who receives "a greater payment than others of his class is required to disgorge so that all may share equally." *Union Bank*, 502 U.S. at 161.

Similarly, §548 of the Code empowers a trustee to avoid fraudulent transfers. A trustee may avoid a transfer that is "actually fraudulent," defined as a transfer "of an interest of the debtor in property ... incurred by the debtor" where "the debtor ... made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became ... indebted." 11 U.S.C. §548(a)(1)(A); *see BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535 (1994). A trustee also has the power, exercised in this case, to avoid "constructively fraudulent transfers," *BFP*, 511 U.S. at 535, which are

transfers "of an interest of the debtor in property" where "the debtor ... received less than a reasonably equivalent value in exchange for such transfer" and, among other possibilities, "was insolvent on the date that such transfer was made ... or became insolvent as a result of such transfer," 11 U.S.C. §548(a)(1)(B)(i)-(ii)(I). The power to avoid actual and constructive fraudulent transfers protects the "rights of creditors vis-à-vis the debtor," by enabling a trustee to thwart a debtor's attempt to "place the debtor's property out of the reach of creditors and thereby hinder the efforts of creditors to get paid." Tabb, *supra*, §6.29.

Other avoidance powers similarly promote "fundamental bankruptcy policies" of equitable distribution and estate maximization. *Id.* For instance, §544 empowers a trustee to avoid transfers that would be voidable under state law and to step into the shoes of a hypothetical judicial lien creditor to avoid certain transfers or unrecorded interests to ensure fair treatment of all creditors. And §545 authorizes a trustee to avoid certain statutory liens that are detrimental to the estate.

All of these avoidance powers share a common feature in that they authorize the trustee to avoid transfers *by the debtor*. Ralph Brubaker, *Understanding the Scope of the §546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought To Be Avoided*, 37 Bankr. L. Letter, July 2017, at 5-6.[2] The trustee has no power to avoid transfers made by

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[2] This Court has relied on Professor Brubaker's scholarship in several recent bankruptcy cases. *See Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1942 (2015); *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2170 (2014).

anyone other than the debtor. *Id.* Thus, this Court has recognized that avoidance under §547 applies to transfers "made by the debtor," *Barnhill*, 503 U.S. at 394, and avoidance under §548(a)(1)(B) "applies to transfers by insolvent debtors," *BFP*, 511 U.S. at 535; *see also, e.g.*, *Union Bank*, 502 U.S. at 152; *In re Knapper*, 407 F.3d 573, 583 (3d Cir. 2005) (noting that §544(b)(1) permits trustee "to avoid a transfer of property by the debtor"). The avoidance provisions reflect the concern that the debtor may have dispersed assets that properly belong to the estate (and ultimately to creditors) by transferring those assets to others with an inferior (or no) claim to the assets. *See* Brubaker, *supra*, at 5-6. The trustee is thus given the power to avoid certain transfers the debtor previously made. Those avoidance powers protect the core "advantages of bankruptcy's collective proceeding," and constitute "an integral part of the bankruptcy process." Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 Stan. L. Rev. 725, 732, 787 (1984).

2. The §546(e) Exception

The trustee's avoidance powers are not absolute. For one thing, the trustee must satisfy the statutory criteria of the particular avoidance provision invoked. A trustee seeking to avoid a transfer as constructively fraudulent, for example, must show (among other things) that "the debtor ... received less than a reasonably equivalent value" and "was insolvent on the date that such transfer was made ... or became insolvent as a result of such transfer." 11 U.S.C. §548(a)(1)(B)(i)-(ii)(I).

A party seeking to defeat a trustee's avoidance action may argue not only that a transfer does not

come within the trustee's affirmative avoidance power, but also that the transfer comes within an exception to the trustee's avoidance authority. Congress has enacted a number of exceptions or "safe harbors" that put "limits on the avoidance powers set forth elsewhere" in the Code. *Fid. Fin. Servs., Inc. v. Fink*, 522 U.S. 211, 217 (1998). For example, §546(a) prevents the avoidance of certain otherwise-avoidable transfers after the passage of a set period of time—usually two years after the filing of a bankruptcy petition. *See* 11 U.S.C. §546(a)(1). Other provisions exempt particular kinds of transfers for policy-based reasons—for example, encouraging and protecting charitable contributions, *see id.* §§544(b)(2), 548(a)(2), or protecting farmers and fishermen in certain circumstances, *see id.* §546(d).

This case involves the exception to the trustee's avoidance power set forth in §546(e), which provides in full:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or

> securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

In short, and as relevant to this case, "[n]otwithstanding" the trustee's general power to avoid certain transfers by the debtor—such as preferential transfers (§547) or constructively fraudulent transfers (§548(a)(1)(B))—the trustee "may not avoid" a "transfer that is a ... settlement payment ... made by or to (or for the benefit of)" one of the half-dozen protected entities named in the statute: "a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency."

B. Factual Background

1. The Parties' Competition

Harness racing is a closely regulated industry in Pennsylvania. Operating a race track requires a license, and state law strictly limits the number of licenses available. *See Bedford Downs Mgmt. Corp. v. State Harness Racing Comm'n*, 926 A.2d 908, 914-15 (Pa. 2007).

In the early 2000s, only one harness racing license was available in Pennsylvania. *Id.* Two companies submitted applications to open a track in northwest Pennsylvania. JA11, 71. One applicant was Valley View Downs LP ("Valley View"), a subsidiary of the Indiana-based gaming enterprise Centaur, LLC ("Centaur"). JA10-11. The other applicant was Bedford Downs Management Corporation ("Bedford

Downs"), a private company owned in large part by members of the Shick family and Petitioner Merit Management Group LP ("Merit"), an Illinois-based gaming company. JA10. Pennsylvania subsequently passed legislation allowing horse racing facilities to offer patrons certain forms of casino gaming—authorizing a hybrid entity known as a "racino"—if the horse track obtained a gaming license separate from the racing license. *Bedford Downs*, 926 A.2d at 911. Both Valley View and Bedford Downs intended to open racinos if they could obtain the requisite racing and gaming licenses. JA12.

Neither company realized its goal. In November 2005, the Pennsylvania State Harness Racing Commission denied both parties the necessary racing license, citing concerns about the proposed site for Valley View's facility and the proposed financing for Bedford Downs. JA13, 72; *Bedford Downs*, 926 A.2d at 911-12. Both applicants appealed that administrative adjudication. In July 2007, the Pennsylvania Supreme Court affirmed the license denials, but permitted both applicants to re-apply. 926 A.2d at 910-11.

2. The Parties' Settlement Agreement

Shortly thereafter, on August 14, 2007, Valley View and Bedford Downs entered into a settlement agreement. JA70. The agreement was "made and entered into by and among" Valley View, Bedford Downs, and Bedford Downs' shareholders, which included Merit. JA70; *see also* JA113 (identifying the "[p]arties in [i]nterest" as Valley View, Bedford Downs, and Bed'ord Downs' shareholders (typeface altered)).

Under that agreement, Bedford Downs promised to withdraw from the racing license competition. JA14. In turn, Valley View committed to purchase all of Bedford Downs' stock for $55 million once Valley View received the racing license. JA70-79. Specifically, the settlement agreement provided that Valley View "shall purchase, acquire and accept from the [Bedford Downs] Shareholders, and each of the Shareholders shall sell, transfer, ... and deliver to [Valley View], all of such Shareholder's right, title and interest in and to all of the outstanding shares of capital stock of [Bedford Downs] owned by such Shareholder." JA77-78. The agreement added that "[t]he consideration to be paid by [Valley View] for the Shareholders' Shares shall be ... $55,000,000." JA78.

The settlement agreement further provided that to carry out its purchase of Bedford Downs' stock, Valley View would "deposit" the $55 million with a "third-party escrow agent" to be determined at a later point. JA78-80. Bedford Downs' shareholders would also "deposit" their stock certificates with an as-yet-unidentified escrow agent. JA80. Once Valley View obtained the racing license and satisfied the agreement's other conditions, the respective escrow agents would release the Bedford Downs stock certificates to Valley View and release $47.5 million of the $55 million purchase price to the Bedford Downs shareholders, including Merit. JA78-82. The remaining $7.5 million of the $55 million purchase price would be retained by the escrow agent for three years to cover the Bedford Downs' shareholders' agreement to indemnify Valley View for potential liabilities arising out of owning Bedford Downs. JA81-83. At the end of three years, the escrow agent would

disburse the balance to the Bedford Downs shareholders. JA83.

Several weeks after executing the settlement agreement, the parties entered into a separate escrow agreement with Citizens Bank of Pennsylvania ("Citizens Bank") to serve as the escrow agent for Valley View's payment to Bedford Downs. JA40-63. The parties also appointed Stewart Title Guaranty Company ("Stewart") to serve as the escrow agent for the stock certificates. JA26-29.

3. The Transfer in Question

The Pennsylvania Harness Racing Commission eventually awarded Valley View the state's final harness racing license. JA14. With that condition satisfied, the Bedford Downs shareholders each signed individual "stock power" directives formally "assign[ing] and transfer[ing]" their shares "to Valley View." JA31-34 (typeface altered).[3] Valley View arranged for the $55 million purchase price, which was financed by a syndicated credit financing arrangement with Credit Suisse, to be wired from Credit Suisse into Bedford Downs' account at Citizens Bank. Dist. Ct. Dkt. 60-9 at 3.

The parties then jointly directed "Citizens Bank, in its capacity as Escrow Agent" to distribute the funds per the settlement agreement and "Stewart ... in its capacity as Escrow Agent" to deliver the stock certificates. JA24-26. Valley View received the

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[3] Unlike the other shareholder "stock power" assignments, Merit's does not include "to Valley View." JA35. This appears to be a scrivener's error, as Merit unequivocally consented to sell stock "to Valley View." JA36.

Bedford Downs stock certificates, and the Bedford Downs shareholders received the $47.5 million. JA30-31. Merit received approximately $13.7 million, corresponding to its ownership share of just over 30 percent. JA64.

A closing statement to the stock purchase reflected the "Buyer" as Valley View, the "Sellers" as the Bedford Downs shareholders (represented by Carmen Shick), and the "Purchase Price" as $55 million less the $7.5 million holdback. JA30; *see also* JA30-31 (Bedford Downs shareholders acknowledging "receipt from Valley View ... pursuant to that certain Settlement Agreement ... of $47,500,000"). JA30-31. A distribution notice likewise characterized the transaction as a "settlement to be paid to the Shareholders of [Bedford Downs] by [Valley View] for the shares of [Bedford Downs]." JA64 n.*.

Several years later, pursuant to the settlement agreement, the escrow agent disbursed the remaining $7.5 million of the purchase price to the Bedford Downs shareholders, including Merit. JA65-68. Accounting for its pro rata share of that distribution, Merit's total receipt from the sale of its shares to Valley View was about $16.5 million. *Id.*

4. Valley View's Bankruptcy

Although Valley View successfully obtained Pennsylvania's last available harness racing license, it still needed a separate gaming license to open its racino. JA14-15. And it needed that license quickly, because its broader financing package was only good for a limited time. JA17; *see also A Racetrack by Many Names—Bedford Downs, Valley View Downs,*

Lawrence Downs, Elwood City Ledger (July 13, 2016), http://bit.ly/2wkrvNg.

The Pennsylvania Gaming Control Board declined to grant the gaming license fast enough, however, and the financing package fell through. JA17. Valley View filed for Chapter 11 bankruptcy in October 2009. JA17-18. Valley View's parent corporation, Centaur, followed suit several months later. JA10-11. Their cases were consolidated in the Bankruptcy Court for the District of Delaware. *See In re Centaur, LLC*, No. 10-10799 (Bankr. D. Del. filed Mar. 6, 2010). The bankruptcy court subsequently confirmed a reorganization plan and appointed Respondent FTI Consulting, Inc., to serve as trustee of the Centaur, LLC Litigation Trust. JA9. In that capacity, Respondent was assigned authority to avoid pre-bankruptcy transfers under the avoidance provisions of the Code. JA9-10; *see* pp. 4-7, *supra*.

C. Proceedings Below

1. The Trustee's Avoidance Action

On October 27, 2011, Respondent filed suit against Merit in the Northern District of Illinois to avoid Valley View's transfer of $16.5 million to Merit as constructively fraudulent under §548(a)(1)(B) of the Code. *See* JA8 (asserting that "Valley View ... fraudulently transferred $16,503,850 to Merit Management").

Respondent alleged that the transfer by Valley View to Merit was constructively fraudulent because (1) Valley View was insolvent at the time it purchased Bedford Downs, and (2) Valley View "significantly overpaid" for Bedford Downs. JA15; *see* 11 U.S.C. §548(a)(1)(B)(ii)(I). Respondent noted that Bedford

Downs had no revenue and limited assets, and that the only conceivable value Valley View received from the purchase was removing competition for the racing license. JA15-16. Given that the racing license sold at a post-bankruptcy auction for $5.6 million—about 10% of what Valley View paid Bedford Downs—Respondent contended that Valley View "did not receive reasonably equivalent value in exchange for its $55 million transfer to the owners of Bedford Downs." JA18.[4]

Merit filed an answer raising §546(e) as an affirmative defense and then moved for judgment on the pleadings, contending that §546(e) barred the trustee from avoiding the Valley View-Merit transfer. JA2. In Merit's view, §546(e) applied because the transfer was a "settlement payment ... made by or to (or for the benefit of)" protected "financial institution[s]"—namely, Credit Suisse and Citizens Bank. 11 U.S.C. §546(e). Merit did not contend that either Valley View or Merit was a financial institution or other entity listed in §546(e).

2. The District Court Decision

The district court granted judgment to Merit. The court repeatedly identified the transfer that the trustee sought to avoid as a transfer by Valley View and "to Merit." Pet.App.20-21; *see* Pet.App.19. The district court further explained that Valley View made this allegedly avoidable transfer "*through*"—not "to"—

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[4] The trustee also sought to avoid the transfer under §544(b), which allows a trustee to avoid transfers that are voidable under state law. *See* JA20-21 (citing the Pennsylvania Uniform Fraudulent Transfer Act). The district court and court of appeals did not directly address that claim. *See* Pet.App.22 n.1.

Credit Suisse and Citizens Bank. Pet.App.21 (emphasis added). Nevertheless, the district court found §546(e) applicable by recharacterizing the single transfer the trustee sought to avoid as multiple "transfers" between Valley View, Merit, and the banks, and reasoning that "the Transfers here were 'by or to' a financial institution because two financial institutions"—Credit Suisse and Citizens Bank—"transferred or received funds." Pet.App.35.

3. The Seventh Circuit Decision

The trustee appealed. In its briefing before the court of appeals, Merit acknowledged that Respondent sought to avoid the transfer "Valley View Downs made to Merit Management in the amount of $16,503,850." Br. of Def.-Appellee 5. Merit nevertheless argued that Respondent could not avoid the Valley-View-to-Merit transfer because the transactions by which it was executed—namely, the wiring of money by Credit Suisse to Citizens Bank, and the wiring of money by Citizens Bank to Bedford Downs—"were made by and to financial institutions." *Id.* at 1.

The Seventh Circuit unanimously rejected that argument and reversed. In an opinion by Chief Judge Wood (joined by Judges Posner and Rovner), the court of appeals held that Chapter 5 of the Code, read as a whole, "creates both a system for avoiding transfers and a safe harbor from avoidance," which "logically" should be interpreted as "two sides of the same coin." Pet.App.8. Therefore, the court explained, it "makes sense to understand" §546(e) "as applying to the *transfers that are eligible for avoidance in the first place.*" Pet.App.8 (emphasis added). Because the only transfer targeted and eligible for avoidance was the

fraudulent transfer by the debtor, Valley View, to Merit, and because it is "undisputed" that neither Valley View nor Merit is among the protected entities enumerated in §546(e), Pet.App.4, the court found §546(e) inapplicable, Pet.App.18. In other words, §546(e) does not bar "transfers that are simply conducted *through* financial institutions (or the other entities named in §546(e)), where the entity is neither the debtor nor the transferee but only the conduit." Pet.App.2.

The Seventh Circuit explained that Merit's interpretation of §546(e) creates inconsistencies with other Code provisions and immunizes a wide swath of transfers in ways Congress never envisioned. Pet.App.15-17. In fact, Merit was forced to concede at oral argument that avoiding the Valley-View-to-Merit transfer would cause "absolutely no harm" to Citizens Bank, Credit Suisse, or any other entity enumerated in §546(e). Oral Arg. Rec. at 25:09-30. Merit nevertheless argued that Congress intended §546(e) to protect "investors generally." *Id.* at 13:47-52. The Seventh Circuit, however, took a different view. It noted that the trustee's avoidance powers provided necessary "protections for creditors," and it declined to undermine those protections by "interpret[ing] the safe harbor so expansively that it covers any transaction involving securities that uses a financial institution or other named entity as a conduit for funds." Pet.App.16. As the court concluded, "[i]f Congress had wanted to say that acting as a conduit for a transaction between non-named entities is enough to qualify for the safe harbor, it would have been easy to do that. But it did not." Pet.App.18.

SUMMARY OF ARGUMENT

The text, context, and purpose of §546(e) all support an interpretation where the relevant "transfer" that must be "by or to (or for the benefit of)" a financial institution is the transfer that the trustee seeks to avoid, not the component transactions by which that transfer is executed.

Section 546(e) includes multiple textual indications that the relevant transfer is the transfer by the debtor that the trustee seeks to avoid, and not its component subparts. First, as the provision's first word "[n]otwithstanding" makes clear, §546(e) is written as an exception to the avoidance power granted to the trustee in other provisions of the Code. There is no question that when judging the applicability of the avoidance power the trustee invokes, the relevant transfer is the one the trustee seeks to avoid. There is no logical reason a different transfer (let alone a transfer by a non-debtor that the the trustee could never reach) would be the focus of whether the exception applies. That reading is strongly reinforced by the fact that §546(e) is written as a limitation on the trustee's powers and addresses not "transactions" that are wholly immune from avoidance, but "transfer[s]" that "the trustee may not avoid." Since the trustee can only avoid transfers by the debtor, it would be more than passing strange if §546(e) applied because of a transaction by a non-debtor financial institution (like Credit Suisse or Citizens Bank here). Moreover, the text asks whether the transfer itself "is" one that may not be avoided, not whether it "involves" or "includes" transactions that may not be avoided. Finally, §546(e) carefully

enumerates six separate active participants in the securities markets that could initiate or receive a settlement payment that a trustee could seek to avoid. Given the ubiquity of financial institutions in making wire transfers to execute settlement payments, that careful enumeration would be for naught if the mere presence of any wire transfer were enough to trigger §546(e). If Congress really wanted to exempt all settlement payments or all settlement payments processed by a financial institution, it would have said so and dispensed with the careful enumeration of protected entities in §546(e).

Multiple canons of statutory construction—from the principle that like terms are given like meanings, to rules favoring narrow constructions of exceptions and disfavoring superfluity, to the notion that statutes protect those in the statutory zone of interest—reinforce that the relevant transfer for determining the applicability of §546(e) is the transfer the trustee has targeted for avoidance, and not the transactions by which that challenged transfer is executed. Surrounding statutory context and provisions are to the same effect.

That reading also comports with the legislative history and purpose of §546(e) and eschews a reading that would harm countless innocent creditors with no countervailing benefit to the institutions §546(e) was designed to protect. Congress enacted what is now §546(e) to abrogate a district court decision that permitted a trustee's avoidance action on behalf of a commodity broker-debtor against a clearinghouse-defendant to go forward. Over the years, Congress added other institutions central to the financial

markets, including "financial institutions," in an effort to prevent systemic risk to those markets. Applying the exception to prevent a trustee from seeking to avoid a transfer by a financial-institution debtor or to or for the benefit of such institutions vindicates the statutory purposes. But applying §546(e) to bar avoidance of a transfer between non-enumerated entities, based on the inconsequential and all-but-inevitable detail that the transfer was executed via a financial institution, needlessly hurts creditors while doing nothing to protect the markets against systemic risk.

In short, the avoidance-authorizing provisions and the exception in §546(e) fit together as a coherent whole. If the transfer that the trustee seeks to avoid is "by or to (or for the benefit of)" a financial institution or other entity enumerated in §546(e), the exception bars avoidance. Otherwise, the trustee may proceed. That straightforward rule resolves this case. It is undisputed that the only transfer the trustee sought to avoid was the transfer by the debtor Valley View to Merit. And it is undisputed that neither Valley View nor Merit is an entity enumerated in §546(e), such as a financial institution. Section 546(e) therefore does not apply.

Merit's contrary interpretation, where §546(e) applies to every margin payment, settlement payment, or securities contract executed through a bank, has nothing to recommend it. Merit's view exalts form over substance. Both the avoidance powers for fraudulent transfers and the exception for certain core players in the securities markets are driven by concerns about the substance of where the

money went, not the details of how it got there. Merit seeks to attribute sweeping consequences to a technical addition to the statute, and can offer no coherent explanation for why Congress would want to harm innocent creditors under circumstances where there is concededly zero risk either to the six protected entities enumerated in the statute or to the broader securities markets.

ARGUMENT

I. Section 546(e) Does Not Bar Avoidance Of The Relevant Transfer—Namely, The Valley-View-to-Merit Transfer That The Trustee Seeks To Avoid.

The statutory construction issue at the heart of this case turns less on a dispute about what some term in the statutory text means and more on which transfer the statute applies to. All agree that the transfer that the trustee seeks to avoid was a settlement payment by one racino to another racino, neither of which is a financial institution. Thus, if the relevant transfer for judging the applicability of §546(e) is the racino-to-racino transfer that the trustee sought to avoid, then §546(e) is inapplicable by its plain terms and the trustee should prevail. The parties likewise agree that the racino-to-racino transfer here, like virtually every other settlement payment, was executed via transactions between financial institutions, rather than by passing a bag of cash. Thus, if the relevant transfers for judging the applicability of §546(e) are the component transactions by which the racino-to-racino transfer was executed, then §546(e) is applicable by its plain terms and Merit should prevail.

The text, context, and purpose of §546(e) provide a clear answer and demonstrate that its applicability is properly judged by reference to the transfer by the debtor that the trustee seeks to avoid, not by reference to the component transactions by non-debtor financial institutions involved in that transfer's execution. Or, as the Seventh Circuit put it, §546(e) applies "to the transfers that are eligible for avoidance in the first place," not to transactions by non-debtors that the trustee could never avoid. Pet.App.8. Since the only transfer that the trustee sought to avoid—and the only transfer "eligible for avoidance in the first place"—was the transfer of $16.5 million by the debtor, Valley View, to Merit, §546(e) is inapplicable here.

A. The Statutory Text Demonstrates That §546(e) Applies to the Transfer the Trustee Seeks to Avoid.

1. Multiple textual features of §546(e) together indicate that it operates as an exception or defense that renders a transfer otherwise within the trustee's avoidance power immune from avoidance. And consistent with that understanding of §546(e)'s role in the statute, the "transfer" that must satisfy the terms of §546(e) is the transfer by the debtor that the trustee seeks to avoid, not the component transactions by which the challenged transfer was executed.

From its very first word—"[n]otwithstanding"—§546(e) makes clear that it operates as an exception to the trustee powers granted elsewhere in the Code. As used in §546(e), "notwithstanding" is a word that indicates that what follows is a specific exception that "puts certain limits" on a more general rule "set forth elsewhere" in the statute. *Fink*, 522 U.S. at 217; *see*

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012) ("A dependent phrase that begins with *notwithstanding* indicates that the main clause that it introduces or follows derogates from the provision to which it refers."). And §546(e) leaves no doubt about which general rules it provides an exception to or where those general rules are set forth. Section 546(e) exempts certain transfers, "[n]otwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b)." Those provisions all grant the trustee the power to avoid certain transfers by the debtor and the discretion to pick which transfers to avoid. To be sure, the transfer identified must satisfy the terms of the avoidance provision the trustee invokes. Thus, it must be a transfer by the debtor, *see* pp. 6-7, *supra*, and, as relevant here, must be constructively fraudulent under the requirements of §548(a)(1)(B). Merit is, of course, free to argue that the Valley-View-to-Merit transfer the trustee seeks to avoid does not satisfy the terms of §548(a)(1)(B).

But "[n]otwithstanding" that a transfer satisfies the terms of §548(a)(1)(B), or "sections 544, 545, 547, ... [or] 548(b)," "the trustee" still "may not avoid a transfer" if it "is" a transfer with certain characteristics. 11 U.S.C. §546(e). In determining whether a transfer has those characteristics, there is every reason to analyze the transfer that the trustee seeks to avoid, and not the component transactions by which that transfer is executed, which will typically be made by non-debtors and thus beyond the trustee's avoidance power in the first place. Here, for example, Merit would have §546(e) apply because the Valley-View-to-Merit transfer was executed via, *inter alia*, a wire transfer by Credit Suisse to Citizens Bank. The

trustee could never avoid that transaction. Credit Suisse is not the debtor, and the relevant avoidance provisions—"sections 544, 545, 547, 548(a)(1)(B), and 548(b)"—authorize only the avoidance of transfers *by the debtor*. When Congress provided that "notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b)" a trustee "may not avoid a transfer" with specified characteristics, it was plainly talking about a transfer by the debtor that the trustee could otherwise avoid—not a component transaction by a non-debtor that the trustee could never avoid.

Merit would deconstruct the Valley-View-to-Merit transfer that the trustee seeks to avoid into multiple component transactions, but the text of §546(e) refers not to "transactions" but to "a transfer," and asks not whether that transfer "involves" or "includes" transactions with certain characteristics but whether the transfer "is" one by, to, or for the benefit of certain protected entities. By asking what the transfer "is," not what it "involves," the statute looks to the substance of a single transfer, not to the details of its execution or to multiple component transactions.

The textual indications do not stop there. The title of §546, "[l]imitations on avoiding powers," reinforces both (1) the function of the section, and its various subsections, as exceptions or limitations on avoidance powers granted elsewhere; and (2) the close connection between the transfer the trustee seeks to avoid and the transfers that come within the terms of an exception. As the Seventh Circuit put it, "Chapter 5 creates both a system for avoiding transfers and a

safe harbor from avoidance—logically, these are two sides of the same coin." Pet.App.8.[5]

In addition, §546(e) provides an exception for transfers that are, *inter alia*, settlement payments "made by or to (or for the benefit of)" half a dozen specified players in the securities industry, including "financial institution[s]." That careful enumeration of six separate entities would be for naught if Merit were correct and every settlement payment executed via wire transfer were exempt. Section 546(e) addresses three categories of transfers—margin payments, settlement payments, and other transfers in connection with a securities contract—that are almost always executed via wire or other bank transactions, as opposed to the physical delivery of bags of cash. *See In re D.E.I. Sys., Inc.*, 2011 WL 1261603, at *2 (Bankr. D. Utah Mar. 31, 2011) ("The Court cannot conceive of a transfer ... made by or to (or for the benefit of) a [protected entity] that would not be accomplished with the use of the banking industry."). Thus, if Congress really intended §546(e) to immunize any margin payment, settlement payment, or securities contract payment executed through a financial institution, it could have dispensed with its enumeration of the other five players in the securities market. Indeed, given the ubiquity of wire transfers in the execution of margin payments, settlement payments, and securities contracts, Congress could have simply

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[5] That close relationship is reinforced by the procedural posture of this case. Merit raised §546(e) as an affirmative defense in its answer to the trustee's avoidance action. The transfer identified in that avoidance action would logically be the relevant transfer for purposes of the §546(e) affirmative defense.

exempted those three types of transactions *vel non* and achieved the same result. On the other hand, if Congress wanted to avoid systemic risk to the securities industry, it would make sense to enumerate six industry players central to the markets and prevent efforts by a trustee to avoid a transfer by, to, or for their benefit—but not by, to, or for the benefit of others, such as racinos. *See* pp. 28-29, *infra* (discussing the canon against superfluity).

Just as the first word of §546(e) indicates that the relevant transfer is the one the trustee seeks to avoid, the last phrase in §546(e) is to the same effect. Section 546(e)'s role as an exception to avoidance powers granted elsewhere is underscored by creating an exception to the exception for transfers involving actual fraud (§548(a)(1)(A)). And the Code creates that exception to the exception by once again focusing on the transfer the trustee seeks to avoid. Thus, "the trustee may not avoid" a transfer by, to, or for the benefit of the enumerated entities "except under section 548(a)(1)(A) of this title"—*i.e.*, unless the transfer by the debtor the trustee seeks to avoid is one that satisfies the terms of §548(a)(1)(A). Thus, from start to finish, the text of §546(e) makes clear that it creates an exception for otherwise avoidable transfers, and thus the proper focus is on the transfer by the debtor that the trustee seeks to avoid, not the component transactions by non-debtors by which the transfer is executed.

2. Multiple canons of statutory construction reinforce that interpretation.

First, there is the canon that "identical words used in different parts of the same statute are

generally presumed to have the same meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005); *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995); *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994). Here, the word "transfer" recurs throughout the avoidance provisions and in §546(e). It forms the structural and substantive link between the trustee's avoidance powers and §546(e)'s bar on avoidance. *See* Brubaker, *supra*, at 9 (noting that "the 'transfer' concept" is "the fundamental transactional unit in the Code's avoiding-power provisions"). The "transfer" that the trustee "*may not avoid*" under §546(e) should logically correspond to the "transfer" that the trustee otherwise "*may avoid*" under its substantive avoidance powers, *e.g.*, 11 U.S.C. §§544(a), 545, 547(b), 548(a)(1). Merit, by contrast, would ask this Court to hold that Respondent "may not avoid" the Valley-View-to-Merit transfer because a different transfer—such as the Credit-Suisse-to-Citizens-Bank transfer—that the trustee could not avoid even apart from §546(e) satisfies the terms of §546(e). That effort to construe the relevant "transfer" in §546(e) as divorced from the transfer in the textually cross-referenced avoidance powers violates this basic canon of statutory interpretation.

Second, there is the canon that exceptions should be read "narrowly in order to preserve the primary operation of the provision." *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013) (quoting *Comm'r v. Clark*, 489 U.S. 726, 739 (1989)). In a variety of contexts, this Court has emphasized that "unduly generous interpretations of ... exceptions run the risk of defeating the central purpose of the statute." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 229-30 (2008)

(quoting *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984)). As noted, §546(e) operates as a "limit[] on the avoidance powers set forth elsewhere," *Fink*, 522 U.S. at 217, and thus is an exception to the trustee's general avoidance powers. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (observing, in bankruptcy case, that a "specific prohibition" on a "general permission" must be "construed as an exception"). Construing the exception in §546(e) not just to block efforts by the trustee to avoid transfers by financial-institution debtors or to (or for the benefit of) the financial institution itself, but to shield every securities-related transaction between non-protected entities that happens to be wired through a financial institution, would give §546(e) an extravagant and unintended scope, rendering it the proverbial exception that would "swallow the rule." *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 530 (2009).

Third, the canon disfavoring superfluity demonstrates that the relevant transfer for purposes of §546(e) is the transfer that the trustee seeks to avoid. Section 546(e) spells out a lengthy and precise list of different market actors that Congress has elected over a period of decades to shield from avoidance liability when it comes to margin payments, settlement payments, and securities contract transfers: "commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency." Reading §546(e) to bar avoidance when the trustee seeks to avoid a transfer that is made by or to (or for the benefit of) one of those entities gives effect to every item on the list. But reading §546(e) to apply to every margin

payment, settlement payment, or securities contract transfer that is routed through a financial institution "fails to give independent effect to the statute's enumeration of the specific" entities that Congress carefully selected. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001); *accord Law v. Siegel*, 134 S. Ct. 1188, 1196 (2014) (explaining that the Bankruptcy Code's "meticulous—not to say mind-numbingly detailed—enumeration of exemptions ... confirms that courts are not authorized to create additional exceptions"); *Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013); *TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001).

The problem with Merit's construction is particularly evident when it comes to Congress' 2005 decision to add "financial participants" to the list of protected entities. Financial participants are defined in the Code as entities with massive exposure to the market—over $1,000,000,000 by one measure and over $100,000,000 by another. *See* 11 U.S.C. §101(22A) (defining "financial participant"). When Congress added financial participants to the list in 2005, financial institutions were already covered. Thus, under Merit's view, unless these highly-sophisticated entities were engaging in all-cash margin payments, settlement payments, and securities contract transfers, Congress accomplished nothing by purposefully adding them to the statute in 2005.[6]

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[6] This special protection for these large entities at the core of the financial markets also belies Merit's claim that Congress actually intended to protect every party to a settlement payment, including modest investors. *See, e.g.*, Pet.Br.35.

Finally, the narrow and sensible interpretation of §546(e) urged by Respondent and adopted by the Seventh Circuit is supported by principles of interpretation that seek to construe a statute so that it protects litigants who fall within the statutory "zone of interests." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014). While the Court has cut back on this principle as a prudential limitation on standing, it has simultaneously reinforced its salience as an important guide to statutory construction. *See id.* at 1387-88. And applying the principle here "requires no guesswork," because Congress specifically enumerated a "detailed" list of entities that it sought to protect through §546(e)—namely, an entity that is a "commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency." *Id.* at 1389.

Merit, a gaming company that invested in a racino, is concededly none of those things, yet it nevertheless invoked §546(e) as an affirmative defense based on its view that the provision applies even to a transfer by a racino to a racino if the transfer is executed via a financial institution from which the trustee seeks no relief. That reading of the statute is irreconcilable with the zone-of-interests test as articulated and recently refined by this Court. *See id.* at 1388-89. And the Court has applied a similar principle in the bankruptcy context: "Where a statute ... names the parties granted [the] right to invoke its provisions ... such parties only may act." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6-7 (2000). Section 546(e) "names the parties" whom Congress sought to shield from a

trustee's avoidance action. When the trustee targets a transaction between two parties far removed from the zone of interests, §546(e) does not shield them based on the happenstance that the transfer was executed via financial institutions.[7]

B. The Statutory Context Reinforces That §546(e) Applies to the Transfer the Trustee Seeks to Avoid, and Not the Transactions By Which That Transfer Is Executed.

Like the text of §546(e), the broader statutory context that surrounds it demonstrates that §546(e) applies to the the transfer that the trustee seeks to avoid, not to the component transactions by which that transfer is executed. It is "fundamental" that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016); *accord Util. Air Regulatory Grp. v. EPA* (*UARG*), 134 S. Ct. 2427, 2441 (2014). This elemental tenet holds true in the bankruptcy context as in others. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017) (construing Code and observing that "a court must not be guided by a single sentence or member of a sentence, but look to the provisions of

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[7] To be sure, if a protected entity were the debtor and a trustee sought to avoid a constructively fraudulent transfer to Merit, Merit could invoke §546(e) as a defense because the terms of the statute would be plainly satisfied and the statutory purposes would be served by not having thousands of transactions by a key hub in the securities industry re-opened. But where the transfer the trustee seeks to avoid is neither by, to, nor for the benefit of a protected entity, the principles of *Lexmark* counsel against straining to provide relief to a non-protected entity.

the whole law, and to its object and policy"); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Because the Court construes "statutes, not isolated provisions," *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010), an interpretation that "may be plausible in the abstract" must be rejected if it is "ultimately inconsistent with both the text and context of the statute as a whole," *Sturgeon*, 136 S. Ct. at 1070. Thus, even ardent textualists have recognized that "'interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning.'" *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017); *see also UARG*, 134 S. Ct. at 2442; *Prost v. Anderson*, 636 F.3d 578, 585 (10th Cir. 2011) (Gorsuch, J.) ("When seeking a statute's ordinary meaning we must of course take care to study not just the particular isolated clause at issue but also its surrounding context.").

The statutory context and structure support the construction urged by Respondent and adopted by the court below. In fact, multiple other provisions in Chapter 5 underscore that commonsense reading.

1. The scope of the trustee's avoidance powers, specifically the limitations on by whom and to whom an avoidable transfer may be made, strongly support Respondent's construction of §546(e). Chapter 5's avoidance powers do not empower the trustee to avoid a broad swath of transfers by or to non-debtor financial intermediaries, but rather specify by whom and to whom a transfer must be made to fall within

the avoidance power. First, as already noted, the substantive avoidance provisions give the trustee the power only to avoid transfers *by the debtor*. *E.g.*, *Barnhill*, 503 U.S. at 394; *Union Bank*, 502 U.S. at 152; pp. 6-7, *supra*. The avoidance provisions' language reflects that understanding. For example, §548(a)(1) provides that a "trustee may avoid any transfer ... of any interest of the debtor in property ... *if the debtor* voluntarily or involuntarily *made such transfer* ... with the actual intent to hinder, delay, or defraud any entity." 11 U.S.C. §548(a)(1)(A) (emphases added). Likewise, it provides that a trustee "may avoid any transfer ... of any interest of the debtor in property ... *if the debtor* voluntarily or involuntarily *made such transfer* to or for the benefit of an insider." *Id.* §548(a)(1)(B)(ii)(IV) (emphases added).

On the other end of the transfer, the avoidance provisions specify that to be avoidable, a transfer must be *to* (or for the benefit of) an entity subject to fraudulent-transfer liability. For example, the preferential-transfer provision states that "the trustee may avoid any transfer of an interest in property ... to or for the benefit of *a creditor*." 11 U.S.C. §547(b)(1) (emphasis added). And §548(d)(1) provides that an avoidable transfer occurs when the "transferee" has an interest in the property superior to others' interests.

The Code's substantive avoidance provisions thus repeatedly refer to avoidable transfers as transfers made *by* the debtor *to* a limited set of entities subject to fraudulent-transfer liability, like creditors. And when the trustee selects a transfer for avoidance, it does not pick a transfer at random and is not free to deconstruct the transaction and designate the *by* and

to as convenient. Here, for example, Respondent targeted the transfer by Valley View to Merit for avoidance because Valley View is the debtor and Merit is a recipient who obtained more than fair value in the transfer. The avoidance provisions required the trustee to target that particular transfer, and there is no logical reason that the application of §546(e) should turn on a transfer by or to anyone else (such as a transfer by Credit Suisse to Citizens Bank). Nonetheless, Merit's position creates just such a mismatch and makes a hopeless muddle of the statutory scheme, contrary to this Court's command to "interpret [a] statute as a symmetrical and coherent regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotation marks and citations omitted).

2. Next, as the Seventh Circuit recognized, the charitable contribution exception in §548(a)(2)(B) underscores that the relevant transfer for purposes of the exceptions is the self-same transfer that the trustee seeks to avoid. Pet.App.11-12. Like §546(e), the charitable contribution exception acts as a limit on the trustee's power to avoid constructively fraudulent transfers. Specifically, §548(a)(2)(B) prevents a trustee from avoiding as constructively fraudulent a "transfer of a charitable contribution" that is "made by a debtor" "to a qualified religious or charitable entity." 11 U.S.C. §548(a)(2)(B). Under the ordinary meaning of that language, the relevant "transfer" that is protected is the transfer the trustee seeks to avoid—*e.g.*, a donation by a debtor to a qualified charity.

If, however, the "transfer of a charitable contribution" is instead understood as component

transactions—*i.e.*, (1) a transfer by the debtor to a bank or check clearinghouse, followed by (2) a transfer by that financial institution to the charity—neither transfer would qualify for the charitable contribution exemption, because neither would be a transfer "made by a debtor" "to a qualified ... charitable entity." The only transfer "made by a debtor" would be to the financial intermediary, and the only transfer "to a qualified ... charitable entity" would be from the financial intermediary. The same would be true of any charitable contribution by a debtor not made in cash or in-kind. Furthermore, the charitable contribution exception is limited to contributions "made by a natural person." *Id.* §548(d)(3)(A). Subdividing a charitable contribution into components would mean that a contribution made by check or wire transfer would be doubly unprotected because it would no longer be "made by a natural person" but would be "made by" a financial institution.

This evisceration of the charitable contribution exception could not have been intended by Congress. Yet there is no reason to slice and dice transfers between racinos into their component sub-transactions when applying §546(e), while looking only to the overall transfer the trustee seeks to avoid when it comes to §548(a)(2)(B).[8]

3. Section 555 sheds further light on the proper scope of §546(e). Section 555 carves out an exception

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[8] Nor would it make sense to apply whichever conception of the transfer—either as targeted by the trustee or as deconstructed into component transactions—that triggers an exemption. Such an approach is counter to canons favoring the consistent construction of terms and the narrow construction of exceptions.

to the Code's general prohibition against enforcement of contractual *ipso facto* clauses, *see* 11 U.S.C. §365(e). The exception applies, however, only where the same six entities enumerated in §546(e) are counterparties to a securities contract with the debtor. *See* 11 U.S.C. §555. It makes no sense to think that Congress, on the one hand, limited the protections in §555 only to specific protected entities that are parties to a securities contract, but, on the other hand, intended to protect *all* parties who receive a pre-bankruptcy payment in connection with a securities contract, so long as the payment was accomplished through a wire transfer or other similar involvement by a financial institution. In the Seventh Circuit's words: "Because section 555 focuses on the economic substance of the transaction, applying only where the named entity is a counterparty as opposed to a conduit or bank for a counterparty, section 546(e)'s safe harbor should apply in the same manner." Pet.App.12.

4. Finally, reading §546(e) to apply to component transactions, rather than the transfer the trustee seeks to avoid, would create tension with §550 as it has long been interpreted. That section is the Code's principal provision governing the trustee's authority to *recover* avoided transfers, an authority that works hand in glove with the avoidance power. Here, for example, Respondent brought an avoidance and recovery action against Merit. JA7.

Section 550(a) provides in relevant part that "to the extent that a transfer is avoided" under one of the substantive avoidance provisions, "the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such

property," from "the initial transferee of such transfer or the entity for whose benefit such transfer was made," or from "any immediate or mediate transferee of such initial transferee." Section 550(b) provides a defense to recovery for certain "transferee[s]" who took for value and in good faith.

Defining the "transferee" is critical to interpreting the scope of the trustee's power to recover an avoided transfer under §550, just as defining the "transfer" is critical to interpreting the scope of §546(e). Although the Code does not define the term "transferee," federal courts of appeals have for decades unanimously agreed that the "transferee" from whom the trustee can recover an avoided transaction must be an entity that has "dominion" or "control" over the transferred property, and not merely a "financial intermediary" or conduit. *Bonded Fin. Servs, Inc. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988) (Easterbrook, J.); *see, e.g.*, *In re Railworks Corp.*, 760 F.3d 398, 403 (4th Cir. 2014); *In re Hurtado*, 342 F.3d 528, 534 (6th Cir. 2003); *In re Ogden*, 314 F.3d 1190, 1196 (10th Cir. 2002); *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 130 F.3d 52, 57-58 (2d Cir. 1997); *In re First Sec. Mortg. Co.*, 33 F.3d 42, 43-44 (10th Cir. 1994); *In re Coutee*, 984 F.2d 138, 140-41 (5th Cir. 1993); *In re Bullion Reserve of N. Am.*, 922 F.2d 544, 548-49 (9th Cir. 1991); *In re Chase & Sanborn Corp.*, 848 F.2d 1196, 1199-1200 (11th Cir. 1988).

Although the circuits use slightly different tests for determining who is an intermediary or conduit that does not qualify as the "initial transferee," "there is essentially *no* disagreement in the case law" on the

fundamental point that intermediaries and conduits are not transferees for §550 purposes. Brubaker, *supra*, at 7; *accord* Pet.Br.30. And there is no disagreement in this case that Credit Suisse and Citizens Bank—the financial institutions that Merit relies on in its attempt to invoke §546(e)—were intermediaries or conduits, and not transferees against whom a recovery action would lie. Indeed, courts have agreed that banks facilitating wire transfers and escrow agents distributing deposits are quintessential intermediaries who "may be disregarded" in determining the "transferee" from whom the trustee can recover an avoided transfer. *Bonded Fin.*, 838 F.2d at 893 (wire transfer); *see Ogden*, 314 F.3d at 1193 (noting that "the escrow agency was a financial conduit rather than a transferee").

To be sure, as Merit points out, avoidance and recovery are distinct concepts. Pet.Br.28-31. But the two provisions are clearly closely related, and the uniform interpretation of §550 to exclude mere conduits from the category of transferees surely reinforces the conclusion that when the trustee targets a transfer between non-financial entities and seeks recovery from the non-financial transferee, the financial intermediaries can be safely ignored.

Moreover, interpreting the avoidance and recovery powers *in pari materia* allows them to reinforce each other in sensible ways. As discussed *infra*, the initial genesis for §546(e) was a concern that vagaries concerning whether financial intermediaries were clearly mere conduits could pose risks to the securities industry. Section 546(e) was added, and

now §§546(e) and 550 reinforce each other and provide a belt-and-suspenders protection for financial institutions and other protected entities. Either they are mere conduits beyond the trustee's recovery power, or if there is some doubt whether they qualify as a transferee (as in the case that give rise to the predecessor of §546(e)), then they are covered by §546(e). One way or another, the protected entity would be entitled to immediate dismissal as Congress intended. But under Merit's view, thousands and thousands of transactions as to which recovery against a financial intermediary would never be possible—because it is obvious that they are mere conduits—are nevertheless shielded from the avoidance power, and §546(e) provides a defense to countless non-protected entities far removed from the zone of congressional interest.

C. The Purpose and Legislative History of §546(e) Demonstrate That Its Applicability Turns on the Transfer the Trustee Seeks To Avoid.

Although §546(e)'s text and context readily demonstrate that its applicability turns on the transfer that the trustee seeks to avoid, rather than the transactions by which that transfer is executed, the purpose and legislative history behind §546(e) strongly reinforce that commonsense conclusion.

Congress enacted the first version of §546(e) in 1978 in response to the decision in *Seligson v. New York Produce Exchange*, 394 F. Supp. 125 (S.D.N.Y. 1975). *See* Pet.App.13-14; Pet.Br.31-32. *Seligson* involved a commodity broker that declared bankruptcy. The trustee of the insolvent commodity

broker's estate sued the New York Produce Exchange and the New York Produce Exchange Clearing Association to avoid (as constructively fraudulent) some $12 million in margin payments made by the commodity broker to the Clearing Association in connection with ill-fated trades in cottonseed oil futures. 394 F. Supp. at 126-27. The trustee's theory was that the Clearing Association had not provided "fair consideration" in "good faith" to the broker in return for the margin payments it requested him to post. *Id.* at 133. While there was some debate over whether the Clearing Association was a proper defendant, as opposed to a mere conduit, the district court found triable issues of fact on that question and denied the Clearing Association's motion for summary judgment, thereby leaving the Clearing Association exposed to the risk of significant liability. *Id.* at 135-36.

Recognizing the substantial potential for the disruption of the commodity trading markets, Congress acted quickly to abrogate *Seligson*. It did so by creating an exception to the trustee's avoidance powers. Specifically, Congress provided that "the trustee may not avoid a transfer that is a margin payment to or deposit with a commodity broker or forward contract merchant or is a settlement payment made by a clearing organization." Pub. L. No. 95-598, 92 Stat. 2549 (1978), *codified at* 11 U.S.C. §746(c) (repealed 1982); *see* S. Rep. No. 95-989, at 105 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5891.

In 1982, Congress expanded the exception to provide that a "trustee may not avoid a transfer that is a margin payment ... or settlement payment ...

made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency." Pub. L. No. 97-222, §4, 96 Stat. 235 (1982), *codified as amended at* 11 U.S.C. §546(e). Congress remained acutely concerned about situations like *Seligson* where the bankrupt entity itself was a direct participant in the securities industry and where a trustee seeking to avoid transfers by such a debtor could cause ripple effects throughout the securities industry. The House Report explained that the exception was necessary "to prevent the insolvency of one commodity or security firm from spreading to other firms and possibl[y] threatening the collapse of the affected market." H.R. Rep. No. 97-420, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583, 583.

Congress subsequently expanded the list of protected entities to include "financial institution[s]" in 1984, *see* Pub. L. No. 98-353, §461(d), 98 Stat. 333 (1984), and further expanded the list in 2005 to add "financial participant" (a term defined to include certain large entities conducting billion-dollar transactions), *see* Pub. L. No. 109-8, §907(e), 119 Stat. 177 (2005); 11 U.S.C. §101(22A). As noted earlier, that last addition would have been unnecessary under Merit's view of the statute. *See* p. 29, *supra*.

Although the list of protected entities evolved, the underlying purpose of the exception did not. The House Report accompanying the 2005 amendment stressed that §546(e) was "designed to reduce systemic risk in the financial market place." H.R. Rep. No. 109-31(I), at 3 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

Applying §546(e) to the transfer that the trustee seeks to avoid aligns perfectly with that congressional design. When the trustee seeks to avoid a transfer by or to (or for the benefit of) one of the protected entities—as the trustee in *Seligson* did in attempting to avoid the transfer by the bankrupt commodity broker to a clearinghouse—the exception properly bars the avoidance of that transfer. *Seligson*, 394 F. Supp. at 126-27; *see also Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 849-50 (10th Cir. 1990) (holding that defendant stockbroker could invoke §546(e) in response to trustee avoidance action); *Zahn v. Yucaipa Capital Fund*, 218 B.R. 656, 676 (D.R.I. 1998) (discussing application of exception when protected entity was the debtor). By substantially restricting the trustee's power when a protected entity is the debtor (*i.e.*, when the transfer is by the protected entity), §546(e) prevents the bankruptcy of one hub in the securities industry from "spreading to other firms and possibl[y] threatening the collapse of the affected market." H.R. Rep. No. 97-420, at 1. And by shielding protected entities from even the possibility that transfers to them or for their benefit could be avoided, §546(e) provides special protection to those core participants in the securities markets. *See* Pet.App.14-15.

If, however, the "transfer" for §546(e) purposes is decoupled from the transfer that the trustee seeks to avoid, as Merit proposes, then §546(e) shields countless constructively fraudulent transfers that harm innocent creditors while posing no material, let alone systemic, risk to the securities markets. Suppose, for example, company A purchases a share of company B, and directs its bank to wire $1,000 to

company B as consideration; neither A nor B is a protected entity. Subsequently, A files for bankruptcy, and the trustee for A seeks to avoid that transfer as constructively fraudulent. *See* 11 U.S.C. §548(a)(1)(B). Prohibiting avoidance of the A-to-B transfer under §546(e) does not promote any of the policies underlying §546(e); requiring B to return the $1,000 to A poses no threat to financial or securities markets, much less a "systemic risk."[9] And there is no greater or lesser risk to the securities market if A made the initial purchase via wire transfer or from a pile of cash.

But shielding this transfer from avoidance as long as the A-B transfer was effectuated by a wire transfer from a financial institution (as Merit's position would require) would come at a great cost to the general bankruptcy policies that underlie the avoidance powers. Innocent creditors will be deprived of a $1,000 that should be rightly returned to the estate for distribution of creditors without any countervailing benefit to the markets or the repeat players enumerated for protection in §546(e).

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[9] The same holds true even if the amount at issue were far greater than $1,000. Even if A paid B $100 million for the share, requiring B to return the $100 million to A, while an obvious imposition on B, would pose no more a threat to the financial or securities markets than would a similar damages award in a non-bankruptcy fraudulent-transfer case—or any case, for that matter.

D. Section 546(e) Does Not Apply Here Because the Trustee Did Not Seek to Avoid Any Protected Transfer.

In sum, based on the text, structure, and purpose of §546(e) and the Code, applying §546(e) in this and every other case involves two straightforward steps. First, the trustee decides to avoid a "transfer" by the debtor to a creditor or other eligible entity under one of the Code's substantive avoidance powers. Second, if §546(e) is raised as a defense to the avoidance of that transfer, the court should evaluate that transfer to determine whether it "is" a "settlement payment ... made by or to (or for the benefit of)" a protected entity. If it is, the trustee "may not avoid" the "transfer" it sought to avoid, because of §546(e). Otherwise, the trustee may proceed.

That straightforward rule resolves this case. The complaint leaves no doubt—and Merit does not dispute—that the only "transfer" the trustee seeks to avoid is the transfer *by* the debtor, Valley View, *to* Merit. *See* JA7-8; Br. of Def.-Appellee 5 (acknowledging that the "transfer" sought to be avoided was the transfer "Valley View Downs made to Merit Management in the amount of $16,503,850"). The trustee does not seek to avoid the transactions by which that Valley-View-to-Merit transfer was executed, such as the wire transfers by Credit Suisse to Citizens Bank or by Citizens Bank to Merit. Indeed, the trustee could not seek to avoid those transactions, because the trustee's avoidance power is limited to transfers by the debtor (not by Credit Suisse or Citizens Bank), and only the Valley-View-to-Merit

transfer arguably involves constructive fraud or any other basis for avoidance.

Likewise, there is no dispute that the Valley-View-to-Merit transfer that the trustee seeks to avoid does not satisfy the terms of §546(e). Even assuming that the transfer by Valley View to Merit was a "settlement payment," it was plainly not "made by or to (or for the benefit of)" any of the protected entities, because Valley View and Merit are operators of horse tracks and casinos, not protected entities. Quite correctly, Merit has never suggested that either it or Valley View is a financial institution or other §546(e)-enumerated entity; indeed, it has conceded otherwise. *See* Pet.3 (stating that "[n]either the purchaser [Valley View] ... nor Petitioner [Merit] is itself a financial institution or one of the other types of entities" in §546(e)); *see also* Pet.App.4 (Seventh Circuit observing that "it is undisputed that neither Valley View nor Merit is" any of "the entities named in section 546(e)").[10]

To be sure, this understanding of §546(e) does not mean that it could never apply to a transaction structured similarly to the stock purchase here. In fact, §546(e) *would* apply to a comparable transfer if

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[10] Neither Valley View nor Merit (nor, for that matter, Bedford Downs or any other Bedford Downs shareholder) is a protected entity. Nor was the transfer "for the benefit" of any such protected entity. That language parallels the trustee's ability to avoid transfers that operate to the benefit of a third-party even though they do not directly receive the transfer. A classic situation is when a debtor pays off the debt a favored creditor owes a third party. Such a transfer may be an avoidable transfer for the benefit of the favored creditor even though funds went to a third party. *See* Brubaker, *supra*, at 8.

either Valley View or Merit were a financial institution. Of course, in that situation, the policy concerns that motivated the enactment of §546(e) would justify the harm to innocent creditors implicit in an exception to the trustee's avoidance powers. Here, by contrast, nothing about avoiding the transfer between aspiring racino operators would have any impact on the securities markets or financial institutions. *See* Oral Arg. Rec. at 25:09-30 (Merit counsel conceding that avoidance would inflict "absolutely no harm" on Credit Suisse, Citizens Bank, or any other entity protected by §546(e)).[11] Under these circumstances, there is no justification in text or policy to prevent the trustee from avoiding the Valley-View-to-Merit transfer and recovering over $16 million to the estate for the benefit of innocent creditors.

II. Merit's Implausible Interpretation Of §546(e) Is Meritless.

Merit's interpretation of §546(e) requires disregarding the transfer that the trustee actually seeks to avoid, artificially subdividing that transfer into the component transactions by which the targeted transfer was executed, and declaring that the targeted "transfer" cannot be avoided if any of those component transactions is "by or to (or for the benefit of)" a financial institution. Merit acknowledges as much in the first paragraph of its brief, claiming that there are "three transfers" in this case that trigger §546(e): (1)

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[11] Confirming the immateriality of the avoidance action to both Credit Suisse and Citizens Bank, neither financial institution has sought to intervene in this case, nor indicated any support for Merit's position.

the transfer of the $55 million stock purchase price "*by*" Credit Suisse "*to*" Citizens Bank, (2) the transfer of a 30% share of $47.5 million "*by*" Citizens Bank "to" Merit upon closing of the transaction in 2007, and (3) the subsequent transfer of a 30% share of the remaining $7.5 million "*by*" Citizens Bank "to" Merit in 2010. Pet.Br.2.

The short answer to Merit's argument is that none of those transactions is the "transfer" that the trustee seeks to avoid. Indeed, none of those transfers by solvent financial institutions is even eligible for avoidance, as Respondent can only seek to avoid transfers by Valley View. The fact that §546(e) might apply to these component transactions if a trustee had a theory as to how these three transfers *by non-debtors* somehow came within the avoidance power is neither here nor there. *See* Brubaker, *supra*, at 10 (noting that construing the §546(e) transfer as subsidiary transfers produces the "nonsensical" scenario in which an "exemption" could be "invoked to shield from avoidance a 'transfer' that is *not* being challenged"). Rather, as the foregoing discussion demonstrates, Merit's effort to apply §546(e) as a defense to a transfer different from the one the trustee seeks to avoid cannot be squared with the statutory text, context, or purpose. None of Merit's arguments in favor of its view justifies departing from traditional principles of statutory interpretation, let alone requires this Court to embrace a view of the statute that needlessly harms innocent creditors.

A. The Plain Language of §546(e) Does Not Support Merit's Interpretation.

Merit repeatedly touts its "plain language" approach to construing §546(e). *See, e.g.*, Pet.Br.3,11,16,20,36. But nothing in the plain language of §546(e)—or any other provision in the Code—suggests, much less dictates, that a court should subdivide the "transfer" that the trustee seeks to avoid into component transactions. In reality, the text provides multiple indicators to the contrary. *See* pp. 22-26, *supra*.

Merit's assertion that Valley View's purchase of Merit's shares in Bedford Downs must be understood not as a single transfer but as a series of separate transactions from Credit Suisse to Citizens Bank to Merit "exalt[s] form over substance." *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013). The Bankruptcy Code has long overlooked intermediate steps in a transaction, especially when seeking to determine whether a transfer by the debtor to some third party (who could be anyone from a favored junior creditor to a family member) was fraudulent or otherwise avoidable. *See Buffum v. Peter Barceloux Co.*, 289 U.S. 227, 233 (1933) (Cardozo, J.). The precise mechanism by which the transfer was executed, by wire transfer or bags of cash, is not the point. Making it the point, as Merit would do, is quite literally to elevate the form of the transaction over the substance of the transfer.

Merit's approach similarly conflicts with the "ordinary, contemporary, common meaning" of the operative statutory language. *Star Athletica*, 137 S. Ct. at 1010. No ordinary English speaker would

describe a transaction involving a bank, a classic intermediary, in the terms that Merit insists must be used here. A teenager who receives a check from her neighbor for babysitting services would not tell her parents that she had just been paid by the drawee bank. Nor would most homeowners say that their monthly mortgage payments are paid by their financial institution or the ACH clearinghouse. In everyday parlance, the existence of such ministerial, intermediary steps is not the point and so is simply assumed without saying. So too, no one would reasonably understand Valley View's purchase of Merit's shares to be a transfer by Credit Suisse to Citizens Bank, or by Citizens Bank to Merit. That is especially true in a context where what matters is not how Valley View got the money to Merit, but whether Valley View paid Merit entirely too much, such that Valley View's trustee can get the money back from Merit. Precisely how Valley View wired the money to Merit is no more critical than precisely how Merit will wire the money back to the estate if the trustee prevails.

That natural understanding is reflected in the way the parties themselves have described the underlying transfer. Merit has repeatedly (and correctly) described the operative transfer as one in which "Petitioner" Merit "and others sold securities *to* Respondent's predecessor in interest," Valley View. Pet.Br.2 (emphasis added). Likewise, below, Merit acknowledged that the trustee sought "avoidance and recovery of" the transfer that "Valley View Downs made to Merit Management in the amount of $16,503,850." Br. of Def.-Appellee 5. Similarly, the district court repeatedly and accurately described the

transfer as one by Valley View "to Merit." Pet.App.20-21; *see* Pet.App.19. And the documents exchanged between the parties in the course of the transaction—including the settlement agreement itself—repeatedly and emphatically confirm that the "settlement" was "to be paid *to* the Shareholders of [Bedford Downs, including Merit] *by* ... Valley View." JA64 n.* (emphases added); pp. 10-13, *supra*. None of these common-sense, real-time characterizations of the stock purchase squares with Merit's *post hoc* reconceptualization of the transfer as the sum of various intermediary transactions for §546(e) purposes.

B. Merit's Challenge to a "Beneficial Interest" Requirement Attacks a Straw Man.

While largely ignoring the relevant question of which "transfer" matters under §546(e), Merit devotes considerable effort to attacking what it sees as an improper, judicially-created "beneficial interest" requirement. Pet.Br.4,15-18,25-26. In Merit's view, such a requirement would contradict the plain language of §546(e) by nullifying the disjunctive "or" in the parenthetical clause "by or to (*or* for the benefit of)."

Merit's argument is unpersuasive for multiple reasons. First, it is a *non sequitur*, because the transfer the trustee sought to avoid—the proper starting point for construing and applying §546(e)—was by Valley View and both to *and* for the benefit of Merit. This case is not the relatively unusual case where the party who directly receives the transfer is not the party that benefits from the transfer. But if

the $16 million went not to Merit, but to some non-protected-entity third party that Merit owed $16 million, then the "for the benefit of" language would be triggered and §546(e) would just as inapplicable. The transfer here was not for the ultimate benefit of some protected entity. Thus, the "for the benefit of" language is simply beside the point.

Merit nonetheless seizes on isolated language in the Seventh Circuit opinion (and an Eleventh Circuit opinion two decades ago) observing that the recipient of a transfer that qualifies for protection under §546(e) will generally have a beneficial interest in the transfer. Pet.App.12-13; *In re Munford, Inc.*, 98 F.3d 604, 610 (11th Cir. 1996). But neither court imposed (or even purported to impose) any extra-statutory requirement of the kind that Merit suggests. To the contrary, both courts simply observed, in construing §546(e) as part of an integrated statutory scheme, that the provisions in §550 governing the recovery of avoided transfers have been uniformly interpreted to apply only to transfers over which the "transferee" has "control" of the funds. Pet.App.12-13 (quoting *Bonded Fin.*, 838 F.2d at 893); *Munford*, 98 F.3d at 610 (quoting *In re Chase & Sanborn Corp.*, 848 F.2d at 1200). As discussed, that observation was entirely justified. *See* pp. 36-39, *supra*. But it was not essential to the holding of either court, both of which ultimately concluded that §546(e) does not apply for the straightforward reason that the transfer that the trustee sought to avoid was not a transfer by or to (or for the benefit of) a protected entity. Pet.App.7-8; *Munford*, 98 F.3d at 610. Merit's argument thus attacks a straw man.

Straining even harder, Merit suggests that Congress sought to overrule the purported holding in *Munford*—and thus, presumably, to preclude the Seventh Circuit's position in this case—through the remarkably subtle stratagem of adding the "(or for the benefit of)" parenthetical to the statute in the Financial Netting Improvements Act of 2006 (FNIA), Pub. L. No. 109-390, §5(b)(1), 120 Stat. 2697-98. Pet.Br.18. But that is pure imagination. Nothing in the text or the legislative history, which characterized the FNIA as making only "technical changes" to the Bankruptcy Code, H.R. Rep. No. 109-648, at 1-2 (2006), *reprinted in* 2006 U.S.C.C.A.N. 1585, 1585-86, even remotely suggests that Congress intended to overrule the two-decades-old court of appeals decision in *Munford* with respect to §546(e) by the extraordinarily roundabout means of inserting a *parenthetical* not just in §546(e) but in four different subsections of §546, *see* FNIA §§5(b)(1)-(4). To put it mildly, one would expect to "see some affirmative indication of intent" if Congress actually meant to make such a departure. *Jevic*, 137 S. Ct. at 984. After all, Congress does not "hide elephants in mouseholes," *id.* (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)), let alone in parentheticals, *see Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) ("A parenthetical is, after all, a parenthetical.").

Indeed, if anything, Congress' addition of "(or for the benefit of)" in §546(e) only underscores the textual and structural interconnection between §546(e) and the cross-referenced avoidance provisions, because those provisions allow a trustee to avoid specified transfers made not only "to" but also "for the benefit of" certain creditors. *E.g.*, 11 U.S.C. §§547(b)(1),

548(a)(1)(B); *see also* Brubaker, *supra*, at 14. As explained above, the express textual and structural interconnections between §546(e) and the substantive avoidance provisions require that the former be interpreted *in pari materia* with the latter. The addition of the phrase "(or for the benefit of)" to §546(e) prevents the possibility that a trustee's avoidance authority vis-à-vis a protected entity might be modestly broader than the exception set forth in §546(e), *i.e.*, that a trustee could seek to avoid a transfer for the benefit of a protected entity and yet §546(e) would except only transfers by or to such an entity. That is a technical fix worthy of a technical amendment (and suitably placed in a parenthetical). And the fact that §546(e) now even more closely mirrors the language in the avoidance provisions further solidifies the link between the avoidance-authorizing and the avoidance-prohibiting provisions and reinforces the wisdom of reading them together.

C. Merit's Appeals to Statutory Purpose and History Backfire.

1. Merit suggests that the reading of §546(e) advanced by Respondent and adopted by the Seventh Circuit would not actually overrule the *Seligson* decision that prompted Congress to enact §546(e)'s predecessor. Pet.Br.31. But that is doubly inaccurate. Both the debtor and the transferees targeted by the trustee in *Seligson* were protected entities. Thus, under Respondent's position, §546(e) would provide a defense to the defendants in cases like *Seligson* both because the transfer the trustee would seek to avoid is *by* a protected entity and because the transfer is *to* a protected entity. Here, of course, the debtor is not a

protected entity, and the trustee did not target a transfer to a protected entity for avoidance or seek any relief from a protected entity. As Merit acknowledges, the trustee brought an action against the shareholders in an aspiring racino, which is not a protected entity. And as Merit also concedes, the racino-to-racino transaction the trustee seeks to avoid does not implicate Congress' stated purpose in enacting §546(e)—to protect certain financial institutions and ensure that the ripple effects of an avoidance do not spread to other firms in, or threaten the collapse of, the securities market. Pet.App.15; *see* Pet.Br.36.

Merit suggests that Congress' actual purposes were broader than those Congress articulated. In Merit's telling, Congress' approach to §546(e) has been "prophylactic, not surgical from the beginning." Pet.Br.41. In reality, Congress has gradually and meticulously expanded the list of entities protected by §546(e) through a series of relatively narrow amendments adopted over several decades. Pet.Br.4-7. And yet, Merit's position is that when Congress added financial institutions to the list of protected entities in 1984, it actually protected the other protected entities and everyone else on the planet, including the "financial participants" subsequently added in 2005, as long as the securities-related transfer was routed through a bank. There is no explanation for that bizarre statutory evolution or that degree of prophylaxis (especially when expanded prophylaxis comes at the expense of innocent creditors). Indeed, Merit's suggestion that Congress wanted to protect all investors, not just six specialized players, is not only implausible, *see Law*, 134 S. Ct. at 1196 (explaining that carefully enumerated

exceptions cannot be expanded), but would leave an odd lacuna for all-cash investors (who, if they exist at all, would probably need the most protection).

Merit further argues that Congress' later amendments to §546(e) render the 1982 House Report irrelevant. Pet.Br.40. But those later amendments simply *supplement* the 1982 statute by adding additional protected entities or making "technical changes," so there is no reason to believe they somehow abrogated Congress' underlying expressed purpose. At a minimum, the burden is on Merit to show "some affirmative indication of intent" by Congress to displace its initially stated purpose. *Jevic*, 137 S. Ct. at 984. But Merit identifies *no* legislative history to support its theory of expanded congressional intent. To the contrary, the 2005 House Report confirms that §546(e) was "designed to reduce systemic risk in the financial marketplace," a concern implicated when the trustee targets a transfer by, to, or for the benefit of a protected entity for avoidance, but not when a trustee targets a racino-to-racino transfer that was executed via financial institutions. H.R. Rep. No. 109-31(I), at 3.

2. Unable to rely on the purposes articulated by Congress in the statutory text or on legislative history, Merit resorts to arguing that "Congress regularly enacts statutes that are broader in scope than the heart of the problem the legislature seeks to address." PetBr.42. But recognizing that not every statute is a rifle shot is no excuse for a blunderbuss approach that obliterates Congress' evident intent. In a search for alternative congressional purposes, Merit posits a concern for the "finality" of transactions. Pet.Br.39-

40. In a context other than bankruptcy and avoidable transfers, that concern might move the needle. But in the context of an exception to an avoidance power that is at war with finality, the sensible conclusion is that Congress was concerned about finality to the precise degree necessary to shield protected entities and avoid ripple effects to the securities industry. Beyond that specific concern, which is concededly not implicated here, there is no hint that concerns about finality trumped the interest in protecting innocent creditors that underlies the avoidance authority.

Merit's protest that, under the reading advanced by Respondent and the Seventh Circuit, the "avoidability of a transfer, or a portion of a transfer, would depend on the identity of the investor and the manner in which it held its investment," Pet.Br.33, is nothing more than a facial attack on the text of the statute itself and the method that Congress chose for pursuing its objective. Section 546(e) is intended to prevent certain enumerated entities from having to return money because doing so could, for example, trigger liquidity concerns that could ripple across the financial markets. It is not a general warranty protecting everyone who engages in securities transactions from having to return inequitably received money.

The same principle forecloses the suggestion in the *amicus* brief filed by shareholders in the pending *Tribune* litigation. *See In re Tribune Co. Fraudulent Conveyance Litigation*, 818 F.3d 98 (2d Cir. 2016), *petition for cert. filed*, No. 16-317 (U.S. Sept. 9, 2016). The *Tribune* defendants argue that §546(e) should apply to them because the transfers in their case

purportedly affected a large number of publicly-traded shares issued by concededly non-protected entities. Br. for Various Former Tribune and Lyondell Shareholders 5-7. But there is no "too big to avoid" exception in §546(e). The *Tribune* shareholders' concern is thus "better directed to Congress," not this Court. *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2119 n.7 (2013).

Moreover, the massive overreading of §546(e) proposed by Merit and its *amici* not only fails to further the purpose of the statute, but directly undermines it. If all it takes to fit into §546(e) is a settlement payment routed through a financial institution, any investor of even minimal savvy can find a way to exploit that artificial loophole. Indeed, following rulings by courts of appeals adopting Merit's theory, commentators have advised practitioners to use "a financial institution, instead of a law firm," as escrow agent so that "an otherwise fraudulent transfer of funds ... may be exempted from avoidance." Irving E. Walker & G. David Dean, *Structuring A Sale of Privately-Held Stock to Reduce Fraudulent-Transfer Claims Risk*, 28 Am. Bankr. Inst. J. 16, 72 (2009). Given Merit's view of the statute, that is sound advice, but that just underscores that Merit's view of the statute is unsound.

Finally, Merit attempts to limit its otherwise limitless conception of §546(e) by contending that §546(e) should apply "at the very least," when the transfer "involves a financial institution that plays a part or serves in a role roughly comparable to a broker or a clearing agency," Pet.Br.45. Merit's felt need to manufacture an artificial, unadministrable, wholly

atextual constraint on its otherwise boundless interpretation of §546(e) is a telling indicator that its position in this case is at odds with Congress' purpose. Congress enacted an exception to the avoidance power that protects six specified players in the securities industry. Merit's suggestion that either this list should be expanded massively or, as a fallback, §546(e) should at least cover situations where non-protected entities utilize intermediary financial institutions in a manner "roughly comparable to a broker or a clearing agency" demonstrates that neither position conforms to Congress' text or intent.

In the end, text, context, and purpose all point in the same direction here. Section 546(e) is an exception to the trustee's avoidance powers. When the question is whether a transfer is avoidable in the first instance, there is no question that the relevant transfer is the one the trustee seeks to avoid. When the question is whether §546(e) provides a defense, there is no reason to look to some other transfer or to fixate on the transactions by which the challenged transfer was executed. Doing so, as Merit suggests, not only deviates from the statutory text and context, but produces results that only the recipient of an avoidable transfer could love. None of the protected entities benefits from Merit's interpretation. No potential ripple effect on the securities market is implicated. Yet the interests of innocent creditors are very much implicated and those interests should not be shortchanged where no countervailing congressional purpose is advanced.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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